

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, Circuit Court Judge

Appellate Case No.: 2016-000323

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S.C. SUPREME COURT

James Bogan, Petitioner;

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the PCR judge err in summarily dismissing Petitioner's PCR application as untimely notwithstanding the holding in *Coats v. State*?¹

¹ 352 S.C. 500, 575 S.E.2d 557 (2003).

STATEMENT OF THE CASE

James Bogan ("Petitioner") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Petitioner was indicted at the June 2011 term of the Spartanburg County Grand Jury for Second Degree Burglary (2011-GS-42-4268) and Petit Larceny (2011-GS-42-4267). Petitioner was represented by James A. Cheek, Esquire ("Counsel"). On June 22, 2011, Petitioner pleaded guilty to the charges as indicted and was sentenced by the Honorable Roger L. Couch to fifteen (15) years imprisonment for Second Degree Burglary and ten (10) years imprisonment for Petit Larceny, to be served concurrently. Petitioner did not appeal his conviction or sentence.

Petitioner filed an application for post-conviction relief ("PCR") on April 10, 2013. On July 18, 2014, Respondent filed a Return and Motion to Dismiss based upon the expiration of the one-year statute of limitations. On July 18, 2014, the Honorable J. Derham Cole issued a Conditional Order of Dismissal, dismissing Petitioner's application as untimely and for failure to allege facts supporting his allegation that his recent discovery that he is parole ineligible constituted newly discovered evidence.

On April 14, 2014, Petitioner filed "Applicant's Opposition to the Court's Conditional Order" in which he argued Counsel misadvised him that he would be parole eligible and that his ineligibility for parole was newly discovered evidence such that he should be entitled to a hearing notwithstanding the one-year statute of limitations.

On January 26, 2016, the Honorable R. Keith Kelly issued a Final Order of Dismissal dismissing Petitioner's PCR action for the reasons set forth in the Conditional Order of Dismissal.

STANDARD OF REVIEW

In a PCR proceeding, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). "Summary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief. Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (citing S.C.Code Ann. § 17-27-70(b) and (c)). In reviewing the propriety of a summary dismissal, this Court must assume facts presented by Petitioner are true and must view the facts in the light most favorable to Petitioner. Id. "The Court will reverse the PCR judge's decision when it is controlled by an error of law." Id. at 435, 611 S.E.2d at 495.

ARGUMENT

The PCR judge did not err in summarily dismissing Petitioner's application as untimely notwithstanding the holding in *Coats v. State*.

PCR actions are governed by “usual rules of civil procedure” Leamon, 363 S.C. at 434, 611 S.E.2d at 495 (citing S.C. Code Ann. § 17-27-80). “The [PCR] court may grant a motion by either party for summary disposition of the application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” S.C. Code Ann. § 17-27-70. Here, the PCR judge dismissed Petitioner's application as untimely and for failure to allege facts that would meet any of the requirements of after-discovered evidence.

The PCR judge properly dismissed Petitioner's PCR action as untimely. The Uniform Post-Conviction Procedure act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

S.C. Code Ann. § 17-27-45(a). The South Carolina Supreme Court has held that this statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Petitioner pleaded guilty to the offenses challenged in his PCR application on June 22, 2011. Petitioner was therefore required to file his application on or before June 23, 2012. This application was filed on April 10, 2013, which was well after the statutory filing period had expired. Therefore, the PCR action was properly dismissed as untimely.

Petitioner also alleged in his application that, under the rule of newly discovered evidence, he should be entitled to an evidentiary hearing because he filed his application for PCR

within one year of discovering he was parole ineligible. Applicant alleged he did not discover that he was ineligible for parole until March 27, 2013. (See App. p. 52). He argues that because he filed his PCR application within one year of that date, his PCR action should not be barred by the statute of limitations.

When an applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appropriate only when the applicant presents evidence showing (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea, and (2) the newly discovered evidence is of such weight and quality that, under the facts and circumstances of that particular case, the “interest of justice” requires the applicant’s guilty plea be vacated. Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014). The PCR Court correctly observed that Petitioner’s knowledge of parole ineligibility satisfied neither prong of this test.

Petitioner presented no facts that, if proven, would have satisfied the first prong of Jamison because the information that Petitioner would be ineligible for parole after pleading guilty could have been discovered with reasonable diligence within the one-year statute of limitations. Petitioner could have inquired sooner about his parole ineligibility. The discovery rule provides that the application must be filed within one year of the date of actual discovery, or after the date *when the facts could have been ascertained by the exercise of reasonable diligence*. S.C. Code Ann. § 17-25-45(C). As Judge Cole noted in the Conditional Order of Dismissal, Petitioner has been deemed a subsequent violent offender, and was therefore not eligible for parole. (App. p. 44). Moreover, the transcript of Petitioner's guilty plea refutes Petitioner's allegation that he was misadvised as to his parole eligibility. First, when the plea judge questioned the defendants as to whether anyone had made any promises, guarantees, or

assurances about any matters whatsoever in connection with their pleas, Petitioner was silent. (App. p. 9). Additionally, the plea judge specifically questioned the defendants about whether they had been given any guarantees about such matters as parole, and Petitioner remained silent. (App. p. 10, lines 1-4). Furthermore, in Petitioner's presence, the plea judge ensured that Counsel had discussed the charges, potential penalties involved, and "the fact that . . . in the case of burglary, *there may be a limited possibility that he would receive parole on any sentence.*" (App. p. 18, lines 6-8). See Knox v. State, 340, S.C. 81, 530 S.E.2d 887 (2000) overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (holding possible errors by trial counsel may be cured by proper advice given by the plea court). Therefore, Petitioner's allegation that he could not have, through the exercise of reasonable diligence, discovered that he was parole ineligible before the expiration of the one-year statute of limitations is conclusively refuted by the record.

Petitioner also failed to set forth facts that would satisfy the second prong of the test because, notwithstanding the failure under the first prong, the alleged newly discovered evidence is not of such weight and quality that the "interest of justice" would require the guilty plea to be vacated. Petitioner acknowledged before the plea judge that he had a lengthy record and the plea judge noted that this would be his fourth strike under the law, and that the State could have sought life without the possibility of parole. (App. p. 27, lines 21-25). Given that Counsel and Petitioner himself acknowledged at the guilty plea hearing that Counsel had explained the weight of possible penalties and implications of Petitioner's charges, it is very likely in fact that pleading guilty would have been in Petitioner's best interest even assuming he knew of his ineligibility for parole. (App. p. 18, lines 1-8). Therefore, even in the light most favorable to

Petitioner, there is no genuine dispute as to any material fact, and the PCR judge did not err in summarily dismissing Petitioner's application.

Furthermore, Petitioner relies on two cases, Coats v. State and Sharper v. State, in arguing that he is entitled to an evidentiary hearing. In Coats, the Court found that Petitioner's claim that Counsel was ineffective for misadvising him that he was parole eligible was not barred by the statute of limitations because his claim fell within the discovery rule as set forth in Coats v. State, 352 S.C. 500, 504, 575 S.E.2d 557, 558. The discovery rule provides:

If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

Id. (citing S.C. Code Ann. § 17-27-45(C)). Even viewing the facts in the light most favorable to Petitioner, his case is distinguishable from Coats v. State. In Coats, the petitioner alleged he was initially informed by counsel *and the Department of Corrections* that he was eligible for parole. Further, in that case, a parole hearing was actually held for the petitioner. Here, Petitioner made no allegation that he was told by the Department of Corrections, prior to his inquiry as to his parole eligibility date, that he was eligible for parole. In this case, there is no evidence in the record that Petitioner was unable, through reasonable diligence, to have found that he would be ineligible for parole within one year of his conviction.

Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983), is also inapplicable to this case because, here, the allegation of ineffective assistance of counsel is conclusively refuted by the record and does not present a question of fact requiring an evidentiary hearing.

Accordingly, the PCR judge was correct in summarily dismissing Petitioner's application for PCR as untimely. Therefore, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's denial of relief.

CONCLUSION

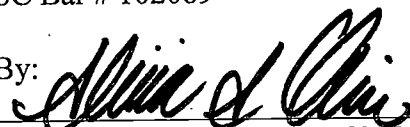
For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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January 17th, 2017

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to the Court of Appeals
Appeal from Spartanburg
The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2016-001430

JAMES BOGAN,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing one (1) copy in the United States mail, postage prepaid:

**Wanda H. Carter, Esquire
SC Commission of Indigent Defense
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This 17th day of January, 2017.


ASHLEY HAXWORTH
PARALEGAL